[illegible] OF CALIFORNIA, [illegible]

[illegible] of the State of California,

Petitioners,

v.

ALCAN ALUMINIUM LIMITED AND
IMPERIAL CHEMICAL INDUSTRIES PLC,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENT
ALCAN ALUMINIUM LIMITED

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QUESTIONS PRESENTED

Did the Seventh Circuit Court of Appeals err in holding that the Worldwide Method of Combined Apportionment ("WCA") imposed on the unitary business headed by the Respondent resulted in a direct burden on its foreign commerce, thus Respondent had standing to challenge the constitutionality of the tax?

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STATEMENT OF THE CASE

I. PROCEDURAL CONTEXT

This action was brought on August 10, 1984 (Joint Appendix ["JA"], at 6-12) by Alcan Aluminium Limited ("Respondent") seeking a declaratory judgment declaring that the imposition of Worldwide Method of Combined Apportionment ("WCA") upon the unitary business of which it was the parent was in violation of the Foreign Commerce Clause of the United States Constitution; and seeking an injunction against the Franchise Tax Board of the State of California and the individually named defendants (hereinafter jointly referred to as the "Petitioners" or "FTB"). The Petitioners responded with a motion to dismiss on three grounds: collateral estoppel, abstention and lack of standing (JA at 13-15). On January 10, 1985, Judge Prentice Marshall denied all the Petitioners' motions (JA at 26-29). Subsequently, the case was assigned to Judge Ann C. Williams. The parties prepared comprehensive stipulated facts and submitted to Judge Williams on cross-motions for summary judgment pursuant to Rule 56 the issue of whether there was an unconstitutional burden. As part of its motion, the Petitioners asked Judge Williams to reconsider Judge Marshall's ruling that Respondents' allegation of an unconstitutional burden on its foreign commerce gives rise to standing. Judge Williams did reconsider, reversed the decision of Judge Marshall, and dismissed Respondents' complaint for lack of standing (Petition for Writ at A-21 to A-27). Respondent appealed Judge Williams' dismissal. The Seventh Circuit unanimously reversed the District Court (*Id.* at A-1 to A-21). That reversal is the subject of the present appeal to this Court.

II. FACTUAL CONTEXT

Respondent, Alcan Aluminium Limited, is a corporation organized and existing under the laws of Canada. Its headquarters and principal place of business are in Mon-

treal, Quebec (Stipulation #2 [hereinafter "Stip."] JA at 64). Respondent and various of its subsidiaries are engaged in all phases of the aluminum business on an international scale. Respondent and nearly one hundred of its subsidiaries operate in several different countries – all wholly outside the United States (Stip. #4, JA at 64). Neither Respondent nor any of its non-United States subsidiaries has a permanent establishment in the United States (Stip. #6, JA at 65).

Respondent indirectly owns all of the issued stock of Alcan Aluminum Corporation (hereinafter "Alcancorp").[1] Alcancorp is a corporation organized and existing under the laws of the State of Ohio; its principal place of business is at Cleveland, Ohio (Stip. #7, JA at 65). Alcancorp and its subsidiaries are engaged in the business of fabricating and selling various aluminum products in the United States (Stip. #10, JA at 66-67). Certain of the activities of Alcancorp are conducted in the State of California (Stip. #10, JA at 66-67).

The Petitioners in this case are the Franchise Tax Board of the State of California, operating through its permanent office in Chicago, Illinois (hereinafter the "FTB"), Leonard Wilson, District Manager of the Chicago Office of the FTB, and B. M. Rarang, Auditor of the Chicago office of the FTB (Stip. #12-16, JA at 67-68). Petitioners have the power and duty to administer the Bank and Corporation Tax Law of the State of California, the California Revenue and Taxation Code, and other California provisions relating to taxation (hereinafter "California tax laws") (Stip. #15, JA at 68).

[1] The direct owner of Alcancorp is also a foreign corporation – Aluminium Company of Canada, Ltd. (Stip. #17, JA at 68-69). Since Stip. #17, a corporate reorganization has occurred. The Aluminum Company of Canada, Limited has changed its name to Alcan Aluminium Holdings Limited and has become a subsidiary of the new Alcan Aluminium Limited. This reorganization in no way affects the tax, its computation or the substance of this litigation.

Petitioners assess franchise taxes on companies doing business in the State of California on what is known as a "unitary" basis. Under this method of taxation, the income of the unitary business "attributable" to California is calculated by a formula which multiplies the total income of the unitary business by the relative percentage of that business's property, payroll and sales in California (Stip. #20-22, JA at 70-71).

Since 1965, the Petitioners have collected detailed financial information on the business and operations of Alcancorp. Petitioners have measured and assessed California franchise taxes not solely on the income of Alcancorp, but also on the worldwide income of Respondent (Alcancorp's indirect parent), and all of Respondent's non-United States subsidiaries (the "Alcan Unitary Business"). Petitioners Wilson and Rarang, acting under color of their authority under state law, have management and supervisory responsibility for these actions of the Chicago Office of the Tax Board (Stip. #16, JA at 68).

The purpose and effect of Petitioners' actions is to inflate greatly[2] the amount of tax assessed and collected by attributing to California a portion of the worldwide income of Respondent and its non-United States subsidiaries.[3] Respondent and its non-United States subsidiaries, however, have no permanent place of business in the United States and, in fact, the activities of Respondent and its non-United States subsidiaries are all taxed by the host country in which those activities take place and in Canada upon distribution (Stip. #42, JA at 85). Thus, the

[2] The tax has in some cases increased the California tax liability by an infinite factor! See pp. 30-31, infra.

[3] Rather than applying this concept of taxation to attribute to California income earned elsewhere by Alcancorp and its subsidiaries, Petitioners are using it to attribute to California income earned *upstream* by Alcancorp's parent corporation and its subsidiaries. This is a significant economic distinction between the foreign parent situation and the application of WCA in the U.S. parent situation.

method of taxation used by Petitioners taxes this income multiple times. More importantly, it effectively *taxes Respondent's foreign operations*. The net economic impact is to ignore the fact that Respondent is operating in the United States through a subsidiary and to treat it as though it was operating directly. Respondent, as a foreign corporation, alleges that Petitioners' application of unitary income taxation in such a manner violates the Foreign Commerce and Supremacy Clauses of the United States Constitution.

In this case, the Petitioners have, in fact, stipulated to facts which establish these allegations as true. Thus, both the District Court and the Seventh Circuit Court of Appeals had before it the full body of facts supporting the allegations. The existence of a direct burden on Respondent's foreign activities is beyond dispute and so, equally, is Petitioners' standing to seek a judicial remedy.

SUMMARY OF ARGUMENT

Respondent's claim to standing is predicated on traditional legal doctrine. WCA injures it directly by effectively eliminating the insulating character one would expect in the role of a shareholder.

Respondent's fundamental thesis is that it is impossible to resolve the standing issue against it without simultaneously resolving the constitutional issue to its detriment. Both the Seventh and the Second Circuit necessarily resolved the constitutional issue in the course of resolving Respondent's standing. The Ninth Circuit artificially attempted to resolve the standing issue as one of pure procedure, and that resulted in its contradicting its logic in prior decisions.

The Petitioners attempt to demonstrate that WCA creates no burden on foreign commerce is plagued with inconsistent contradiction. It is clear that no consistent reasoning can lead one to the conclusion that the WCA's effective elimination of the subsidiary as a vehicle for

conducting foreign commerce is a benefit to anyone other than the Respondent.

Finally, it is well recognized that under every standard articulated by this Court, the public statements of respected national officials and common sense economics, WCA constitutes an impermissible burden on Respondent's conduct of its foreign commerce. Since it has suffered a direct injury, Respondent is entitled to standing and to a determination that WCA is constitutionally proscribed.

ARGUMENT

I. CONTRARY TO THE ASSERTION BY THE PETITIONER, THE DECISION OF THE SEVENTH CIRCUIT IS PREDICATED ON TRADITIONAL NOTIONS OF STANDING

It is a well established principle that shareholders may not bring an action in their own name when that action derives solely and exclusively from an injury to the corporation in which they own stock. This principle derives from the long-standing and well recognized principle that a corporation is a separate and distinct legal entity from its shareholder. *Hawes v. Oakland*, 104 U.S. 450 (1881). The concept that a corporation is a legal person is *sine quo non* for the corporation. It is this concept that, except in the most unusual circumstances, insulates the shareholder from personal liability for the actions of the corporation. The corollary to limitation of liability for the shareholder is that the shareholder has no direct cause of action for injuries to the corporation; it must sue derivatively.

An equally, well established principle is that a shareholder is not deprived of a personal right of action simply because of his shareholder status. This principle is described by the Petitioners in their brief on page 23:

> "In cases of the first sort, the complaining shareholder may sue as an individual only because he

> stands, and has been injured in his relationship to the corporation, in a capacity other than that of a shareholder."

Petitioners' Brief on the Merits, p. 23 ("Petitioners' Brief"). It is this well established principle which is the basis for this case.

Petitioners attempt to distinguish this case by suggesting that the Respondent is merely complaining about injuries to its U.S. subsidiary. Nothing could be further from the truth. This case involves a direct injury to the Respondent; it results from a direct breach of duty to the Respondent. Moreover, conceding such a proposition would obviate Respondent's constitutional challenge to WCA.

A. PETITIONERS HAVE CONTINUOUSLY REPRESENTED THE UNITARY METHOD OF TAXATION AS A DIRECT TAX ON RESPONDENT

Petitioners and their Amici have attempted to recharacterize WCA as a tax exclusively imposed on the American subsidiary. Their most recent attempt at this recharacterization is the Petitioners' use of this Court's dictum which stated that the unitary method of taxation did not result in taxation of extra territorial income to support the proposition that there can be no double taxation of Respondent by WCA and, therefore, no direct injury. See *Shell Oil Company v. Iowa Dept. of Revenue*, ___ U.S. ___, 109 S.Ct. 278, 102 L.Ed. 2d 186 (1988). This Court's comment was clearly intended to make a different point involving the statutory interpretation of territorial limitations in the federal statute regulating offshore drilling. That point was that using the unitary method in the context allocating income of a *single* company among the states, was *not the same as* assessing a tax on entities physically located in the jurisdiction. Clearly, this Court's comments in *Shell* were not intended to change its explicit holding in *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983), that WCA can and does result in extraterritorial double taxation.

In fact, there is little doubt that WCA is directly imposed upon the Respondent, and it is this fact that gives rise to standing. Petitioners in this case and in prior cases place this fact beyond dispute in their own characterizations of the tax.

Unitary taxation starts with the proposition that the nature of a unitary business is such that it is impossible to identify the source of profits, i.e., "the profit is derived from the operation of the business as a whole." (Def. Brief, *Alcan Aluminum Ltd. v. Franchise Tax Board of California*, 558 F.Supp. 624 [S.D.N.Y. 1983] [hereinafter "*Alcan I*"], p. 4, Exhibit A) The unitary business can be composed of one corporation or of "many related corporations." (Def. Brief, *Alcan I*, p. 3) In *Alcan I*, the Petitioners stated that Respondent and Alcancorp are a unitary business and that the business "spreads beyond California and national boundaries." (Def. Brief, *Alcan I*, p.3) Consequently, conclude Petitioners, the unitary tax must be imposed upon the "business income of *all* corporations engaged in the single unitary business." (Def. Brief, *Alcan I*, p.3, emphasis supplied)

The Petitioners concede the same things in this case. For example, on page 2 of their Brief in Response at the Seventh Circuit, they state that the FTB determined that, rather than calculating California income tax on the domestic subsidiaries' income, it "should be calculated on an apportioned share of the total business income of the respective multinational enterprises of which they are part." Petitioners ignore corporate distinctions and treat Respondent's worldwide operations as a single entity business:

> The first step in the process is to identify those corporate entities and activities which constitute a *single* unitary business. (Emphasis added)

Appellees' Reply Brief, 860 F.2d 688 (7th Cir. 1988), at p. 2.

Again on page 5 of the same brief, the Petitioners state that "the Board determined that Alcancorp and its immediate parent, Aluminium Company of Canada, Limited ("Alcan Canada"), were engaged in a *single unitary*

business. (Emphasis added, p. 5) Again on page 6, the Petitioners demonstrate their total disregard of separate corporate status, stating that "Alcancorp is part of a single unitary enterprise conducted by the Alcan Group Companies." Again on page 6, the Petitioners disregard Alcan's U.S. subsidiaries' separate U.S. activities and state equivocally that California tax liability is "an apportioned share *of the total business income of the unitary business conducted by the Alcan Group Companies*." (Emphasis added.) Finally, on page 25 of the Seventh Circuit Reply Brief, Petitioners state "it is impossible to say where the income of its [the unitary business] various components actually is 'earned.' "

What should put this entire issue of what is being taxed beyond dispute is this Court's recognition in *Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983), that what is being taxed is not the income of a corporate subsidiary, but the income of the unitary business, and it states that in unequivocal terms. The existence of the concept of a shareholder is quite irrelevant to the process and not mentioned by the Court:

> The unitary business/formula apportionment method is a very different approach to the problem of taxing businesses operating in more than one jurisdiction. It rejects geographical or transactional accounting, and instead calculates the local tax base by first defining the scope of the "unitary business" *of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that "unitary business" between the taxing jurisdiction and the rest of the world*. . . .

463 U.S. at 164-165 (emphasis added).

Now, in comes the Respondent, parent of the Alcan Group Companies, to complain about the fact that its status as shareholder, and what should be concomitant insulation of its foreign income, is being ignored for the purpose of calculating the California tax. It comes complaining about the fact that, rather than being treated as a shareholder of its U.S. subsidiary, it and its U.S. subsidiary are treated as a "single" business. And Petitioners'

answer is to hypocritically claim "you are only a shareholder."

This Court should recognize this charade for what it is and hold, as did the Seventh Circuit, that when California elected to treat the Alcan Group Companies as one business, it ignored the Respondent's shareholder status, and having done so, it cannot now rely on that status to avoid being challenged for having ignored it in the first instance!

B. THIS CASE INVOLVES A CONSTITUTIONAL DUTY OWED DIRECTLY TO RESPONDENT

In arguing that Respondent's only remedy is through a suit by its subsidiary, Alcancorp, Petitioners are urging this Court to adopt a procedural remedy that, in effect, presupposes the constitutionality of WCA as applied to foreign parents. For the very same reason, Respondent has been tenacious in insisting on its right to complain about the tax.

Perhaps the most elegant expression of this principle is that of the Seventh Circuit which stated:

> It is the incidence of the unitary tax, its potential to disfavor a particular mode of foreign participation in the American economy, rather than the magnitude of the cost it imposes that provides the strongest argument for standing.

860 F.2d, at 697. (Petition for Writ at A-15.)

It was the expectation of Respondent when it invested in the United States that if it entered the United States through the use of a subsidiary, the only impact it would see on its non-U.S. activities would follow exclusively through its shareholder status. Respondent did not expect every activity it conducted outside of the United States would influence liability for California income tax.

Respondent has recognized the longstanding rule that shareholders may not sue in their own right to

vindicate a claim against a corporation. However, it is equally recognized that this rule does not apply where there is a breach of a duty owed to the shareholder:

> The general rule is, of course, well established that an action to redress injuries to a corporation, whether arising out of a contract or tort, cannot be maintained by a stockholder in his own name, but must be brought in the name of the corporation, the stockholder's rights are merely derivative and can only be asserted through the corporation. *The rule does not apply in a case where the stockholder shows a violation of a duty owed directly to him.*

Schaffer v. Universal Rundle Corp., 397 F.2d 893, 896 (5th Cir. 1968), emphasis added.

The constitutional issue in this case is essentially a dispute over whether WCA applied to the unitary business headed by Respondent contravenes a constitutional duty owed to it.

The Petitioners and the Amici have put great weight on the existence of a remedy for Alcancorp in the state courts. That is perhaps the best example of how a decision on standing effectively determines the merits of the constitutional controversy. If this Court were to determine that Respondent does not have standing because its only injury from the tax is derived from its shareholder status and the constitutional claim must be pursued in the state courts, the question then arises as to the nature of the constitutional challenge in the State Court. If it has been established that the only impact of WCA on foreign commerce derives from Respondent's status as shareholder, this impact is not a burden on foreign commerce and no constitutional injury occurs. *In short, this Court cannot determine the shareholder-standing issue adversely to Respondent without simultaneously resolving the constitutional issue to Respondent's detriment!*

C. THE HOLDINGS OF THE SECOND CIRCUIT IN *ALCAN I* AND THE NINTH CIRCUIT IN THE FIRST *EMI*[4] DECISION BOTH SUPPORT THE PROPOSITION THAT STANDING CANNOT BE ADDRESSED WITHOUT ADDRESSING THE MERITS

Petitioners place great weight on the proposition that the standing issue is in dispute among the Circuits. They are correct. However, they gloss over the reasoning in the cases which illustrates two critical points. In *Alcan I*, the Second Circuit Court of Appeals, relying on the reasoning of the District Court, held that Respondent lacked standing because there was no independent and direct injury from WCA, since it believed that this Court had resolved the constitutionality of WCA as applied to foreign parent combinations in *Mobil Oil v. Commissioner of Taxation*, 445 U.S. 425 (1980). The district court in *Alcan I* reasoned as follows:

> In an attempt to assert standing for itself in this action, plaintiff claims that the FTB has imposed a tax directly on its income. This is not so. California's unitary tax is specifically structured so as to tax a corporation proportionate to the amount of business it does within the State; the unitary method is not a tax on non-California businesses or income. Because the profits of a unitary business "arise from the operation of the business as a whole, it becomes misleading to characterize the income as having a single identifiable source." *Mobil Oil Company v. Commissioner of Taxation*, 445 U.S. 425, 438 (1980) The Supreme Court there recognized such unitary schemes to be valid method of corporate taxation. . . . cites omitted. Thus the plaintiff's claim of a direct tax on itself is invalid and Alcan has no "distinct palpable injury" on which to base a claim of standing. . . . Plaintiff seeks to further bolster its

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[4] *Capitol Indus. – EMI Ltd., Inc. v. Bennett*, 681 F.2d 1107 (9th Cir. 1982), *cert. den.*, 455 U.S. 943 (1982).

argument against formula apportionment by emphasizing the foreign source of the income being taxed. In a strained syllogism, plaintiff argues that a) unitary taxation is a tax on foreign commerce, b) Alcancorp engages in no foreign commerce, so c) the tax must be upon Alcan rather than its subsidiary. As previously demonstrated, *the unitary tax is imposed neither upon foreign commerce nor Alcan itself. The weakness of the plaintiff's logic aside, this assertion once again ignores Mobil Oil, which held that the foreign source income does not preclude its taxation under the unitary method.*

558 F.Supp., at 627 (emphasis added).

Rather than making Petitioners' point, the Second Circuit makes our point. You cannot resolve the standing issue without resolving the merits. This is amply illustrated by the logic of the district court, adopted in whole by the Second Circuit, which held that standing did not exist because WCA as applied to foreign parent combinations was constitutional.

EMI Ltd. v. Bennett, 738 F.2d 994 (9th Cir. 1984), cert. den., 469 U.S. 1073 (1984), is not much more help to the Petitioners. In attempting to arrive at a predetermined destination, the Ninth Circuit tripped over its own logic. In seeking to minimize EMI's claim of direct injury by ignoring explicit allegations to the contrary, it concluded that EMI's only injury was to the value of its stockholdings[5] – it suffered no direct injury from the tax. What the Ninth Circuit had forgotten was its own recognition of a direct injury when it rejected the bar to a foreign parent suit under the Tax Injunction Act (28 U.S.C. § 1341), stating quite explicitly that Petitioners should have provided a direct remedy to EMI in the WCA taxing scheme:

> Allowing a parent corporation to bring an action in federal district court to challenge a state tax assessment against its subsidiary corporation could result in the circumvention of state remedial procedures

[5] See *Shell supra* for same reasoning.

> that Section 1341 was intended to prevent. See note 12 supra. Moreover, simultaneous federal and state actions involving substantially similar issues clearly is not desirable. California, however, could eliminate both problems by clearly providing a judicial or administrative remedy in which such non-taxpaying entities, which are interested parties and have stated a claim with respect to an assessment, could participate as parties. (Such a remedy might be particularly appropriate where the state is applying the unitary assessment method to a domestic subsidiary and its foreign parent, and where the state is demanding the business records of the foreign parent.)

Capitol Industries-EMI, Inc. v. Bennett, 681 F.2d 1107, 1119 fn. 32 (9th Cir. 1982) *cert. den.*, 455 U.S. 943 (1982).

Now, why should someone who has no direct injury be entitled to their own direct remedy?

In sum, these cases hurt Petitioners rather than help them. Petitioners' prime objective is to avoid resolution of the merits of the constitutional controversy. These cases demonstrate that an intellectually honest and consistent assessment of the standing can only be made in the context of a resolution of the merits of the constitutional issue.

D. THE SEVENTH CIRCUIT, LIKE THE SECOND CIRCUIT BEFORE, RESOLVED THE STANDING ISSUE BY ADDRESSING THE MERITS

Perhaps the most telling example of how the merits and the issue of standing are inextricably related are the words of the Petitioners who lament in their opening brief:

> The Court of Appeals has confused these constitutional claims with the essential question of standing: whether the parent-stockholder, or the corporate taxpayers, are the proper parties to litigate the constitutional claims.

Petitioners' Brief, p. 32.

Of course, the Seventh Circuit was no more confused than the Second Circuit; each Circuit reached a different

result on the constitutional merits of the tax[6] and concomitantly reached a different result on the issue of standing. In fact, when Petitioners attempt to reduce the standing question to one of pure procedure, it finds itself in the same predicament as the Ninth Circuit – one of contradiction.

1. Petitioner Attempts To Argue That WCA Can Create No Direct Injury Because No Form Of Business Transaction, Even One At Arms Length, Between Unrelated Parties Will Be Subject To Unitary Treatment

The Seventh Circuit has expressed the direct injury to Respondent created by WCA most eloquently to date. It said that the injury was that WCA effectively deprived foreign parents of the tax benefits of operating in foreign commerce through the vehicle of subsidiaries.

Petitioners have attempted to recharacterize this by saying that the Seventh Circuit rejected our claims of injury *to wit:* double taxation and substantial compliance burden.[7]

Rather than rejecting these as injuries, the Seventh Circuit merely stated that "viewed narrowly" these claims "may" not be enough. Rather, the court concluded it was the fact that the "incidence" of these problems fell

[6] Although the Seventh Circuit never expressly disclaimed reaching the merits of the constitutional issue, its views are clear, as clear as its position on standing in *Alcan II*, where it also disclaimed it reached the merits of the standing controversy.

[7] As will be addressed later herein, these two elements have only been part of the direct burden urged by the Respondent which Respondent described at oral argument at the Seventh Circuit as a "Total Business Burden".

in foreign commerce, and that all the effects of the tax combined to essentially eliminate the well accepted benefits of the subsidiary as a means of making foreign investment, which gave rise to standing. In short, under the WCA method of taxation the foreign parent is treated for tax purposes as though it operated directly in the United States without any benefit of shareholder status. Each of the consequences of WCA, in effect, combined to eliminate the subsidiary as an economically distinguishable alternative for conducting foreign investment. Thus, the Seventh Circuit did not reject our claims to "direct injury", rather it said that the injury is not the double tax or compliance cost, *per se*, but rather the net economic impact in the context of foreign parent investment. The result is to limit a foreign parent to contract operations with third parties in order to achieve the same tax consequences one would normally get by operating through a subsidiary.

Petitioners' mischaracterization of the Seventh Circuit's reasoning notwithstanding, they clearly understand what the Court was saying as is demonstrated by their rather sad attempt to argue that operating through a subsidiary is no different than operating in any other format. Their argument is more than wrong; it makes the opposite point. First, they try to suggest that in order to operate in the United States as the Respondent does, manufacturing, research and selling must be conducted by direct investment. To describe that conclusion as naive would be charitable. In fact, it is well established that one is capable of operating an entire business from the design through marketing on a contract basis.

Implicitly recognizing that no reasonably sophisticated person is going to accept their characterization of business practices, Petitioners then attempt to argue that even if we could operate by contract it would make no difference. In their Petition for Rehearing, they argued that they would treat as unitary the contract operator who was unrelated and dealing at arms length with the

foreign company. In the Brief before this Court, Petitioners try to back away from that erroneous argument, and in doing so they back away from the point they want to make. Now, Petitioners argue they only intended to treat the foreign parent as unitary. That, of course, will not result in equivalent tax treatment. For example, if a foreign parent purchased finished goods in California for resale outside California, there could be no unitary treatment since it had no payroll, sales and property in the State. If it produced those goods through a subsidiary, there would be unitary treatment. That is exactly the point that the Seventh Circuit makes.

2. **Petitioners Suffer From Contradiction As Did The Ninth Circuit in *EMI***

Like the Ninth Circuit, who found that the injury to EMI was simply derivative and simultaneously lamented the fact that EMI's independent injury deserved its own independent right of action in the State Court, Petitioners find contradiction plaguing their reasoning.

On pages 27 through 29 of the Brief on the Merits, the Petitioners argue that, no matter what form of business one selects, the tax treatment is the same. This is Petitioners' effort to show there is no burden. They conclude in this respect:

> The unitary method would be used to determine taxable income attributable to California regardless of the form chosen.

Petitioners' Brief, p. 31.

After having taken almost three pages in trying to show that regardless of the form of business you select the tax consequences will be the same, just a page later they make the opposite argument in attempting to argue that even if there is a burden it is not "a cognizable injury for standing purposes":

> In effect the Court of Appeals has held that, everything else being equal, a foreign company should not be faced with a state tax law which would tend to discourage one form of business over another. . . . It is a fact of life, however, that tax consequences often vary, depending upon the form of doing business, the form of a particular business transaction, etc.

Petitioners' Brief, p. 31.

Having to play both sides of the fence is the natural consequence of denying the reality of WCA. The Petitioners ignored our shareholder status in assessing the tax, then deny us access to complain about the fact we are not being treated like a shareholder by claiming we are a shareholder. Once you take the position of supporting the Petitioners, as the Ninth Circuit did in *EMI*, consistency of reasoning is foreclosed.

II. THERE IS A "TOTAL BUSINESS BURDEN" ON RESPONDENT WHICH IS DIRECT AND CONSISTS OF AN UNCONSTITUTIONAL IMPACT ON FOREIGN COMMERCE WHERE RESPONDENT AND ITS FOREIGN SUBSIDIARIES EXCLUSIVELY OPERATE.

As we have demonstrated, it is simply impossible to resolve the standing issue without resolving the fundamental constitutional issue. Put another way, if Respondent suffers no direct burden on its foreign commerce and has no standing, then this Court has effectively decided the foreign commerce issue. It is well recognized that burdens derived through shareholder status do not create burdens on foreign commerce. If Respondent has no standing, there is no foreign commerce issue to be raised in the state court by the U.S. subsidiary – the matter is resolved.

Thus the issue is whether the burden imposed by WCA is direct, and therefore, unconstitutional, or whether it is derived. If the tax is unconstitutional, it is by definition direct and not simply derived through one's status as a shareholder. Incredibly, notwithstanding comprehensive argument to the contrary, the Petitioners assert:

> Furthermore, Alcan and Imperial have never explained why taxes imposed on Alcancorp and Americas would directly injure the parent companies even if the tax is not measured solely by the subsidiaries' income.

Petitioners' Brief, p. 37

In fact, as Petitioners have argued in every preceding case, WCA implicates every facet of a company's operation directly and by every reasonable standard articulated by this Court, its impact on Respondent's activities in foreign commerce is both direct and unconstitutional.

Whether there is an impermissible burden on foreign commerce is governed by the principles enunciated by this Court in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). In that case, this Court prohibited the application of a property tax to cargo containers engaged in foreign commerce and, in doing so, detailed some objective tests for determining whether a state tax unconstitutionally burdens foreign commerce.

A recent case before this Court, *Container Corporation of America v. Franchise Tax Board*, 463 U.S. 159 (1983), considered the application of the principles of *Japan Line* to WCA for American-parent, foreign-subsidiary combinations. In that case, this Court held that WCA applied to American-parent, foreign-subsidiary combinations did not violate the Foreign Commerce Clause; however, it explicitly excepted from its ruling the case of foreign-parent, domestic-subsidiary combinations. This case presents the precise issue left unanswered in *Container*. When one examines this Court's reasons in *Container* for excluding the foreign parent case, it becomes clear that imposing WCA on foreign parent combinations offends the principles of *Japan Line* and violates the Foreign Commerce Clause of the U.S. Constitution.

The stipulated record below establishes that Respondent's factual allegations in its complaint are true. Thus it has standing and its activities in foreign commerce suffer from the burden imposed by WCA. Consequently, WCA as applied to foreign-parent, U.S.-subsidiary combinations violates the Foreign Commerce Clause of the U.S. Constitution, in that it constitutes a direct rather derivative impact on Respondent.

A. Administrative Burden

With respect to the existence of the administrative burden, there are a number of stipulations demonstrating that the information necessary to administer the tax comes from the Respondent or its non-United States subsidiaries. For example, Stipulation #25 describes the mechanism utilized to develop the data used as the basis by the Petitioners in allowing accelerated depreciation. The stipulation shows that of the total hours spent on the project, 88% of the time was hours spent outside the United States and 85% of the time, or 875 hours, was time spent by personnel of the Respondent or its non-United States subsidiaries. (JA at 73)

This vast amount of time was spent on the Petitioners' short-cut method[8] which, it is worth adding, was only allowed by the Petitioners after the Respondent began the series of lawsuits (culminating in this one) challenging WCA.[9] If the Respondent had not permitted the short-cut method (it is not under a legal obligation to allow approximations[10]), and Respondent was obligated

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[8] At a per hour accountant cost of $70 per hour, the direct cost to Plaintiff was $61,250; certainly not de minimus!

[9] Plaintiff started its actions against the FTB in June of 1981. The FTB allowed accelerated depreciation deductions as follows:

1965 through 1971	allowed	September 18, 1985
1971 through 1974	allowed	March 8, 1984
1974 through 1978	allowed	March 8, 1984

[10] Cal. reg. §25137-7(e), Stip #20, permits the FTB to use reasonable approximations but does not require it to do so. (JA at 70)

to calculate actual accelerated depreciation, the cost would include a $3.8 million investment in a computer system (software) and an additional $2.2 million in yearly manhours (Stip. #35, JA at 82).

Moreover, it is not merely accelerated depreciation which imposes costly administrative demands on the Respondent. The Last In First Out ("LIFO") inventory method has never been allowed by the Board although it has been requested on numerous occasions (Stip. #22, *Id.* at 70-71). If Respondent were to actually use the LIFO inventory method and follow the same methodology as Alcancorp, the cost would be even more devastating, adding an additional $3.5 million of yearly manhours (Stip. #35, *Id.* at 83).

However, one need not look simply to the administrative burden of calculating the deductions applicable to the tax to find administrative burdens imposed by WCA on the Respondent. Virtually all the information necessary for the administration of the tax must be obtained from the Respondent. For example, in Stipulation #21 (*Id.* at 70), it was noted that the Board's calculations of the tax was based on published data of the Respondent "and other information submitted by Alcancorp which was obtained from [Respondent]." In Stipulation #22 (*Id.* at 71), it is stated that the calculation of business income involved a number of adjustments and that the calculation of percentage depletion and accelerated depreciation was "based upon data supplied by Alcancorp which it obtained from [Respondent]." Additional reliance on the Respondent for the proper administration of the tax is described in Stipulation #26(b) (determination of proper worldwide payroll calculation) and Stipulation #32 (election of tax accounting methods) (*Id.* at 74 and 78).

In short, the nature of WCA reporting is that it cannot be administered without placing a substantial burden upon the worldwide organization. This burden is exacerbated in the case of foreign parents for two reasons. First, foreign parents, including the Respondent, generally have a far larger part of their investment outside of the

United States than does the typical American parent with foreign subsidiaries.

Second, their burden is not necessary for their own federal tax compliance. WCA bases a substantial part of its tax scheme on the U.S. federal tax scheme. Since American parents are subject to U.S. federal taxation, the additional effort for those parents to comply with WCA is minimal. However, since foreign parents are not subject to U.S. federal taxation, the effort they must undergo to comply with the U.S. federal tax scheme is unique to WCA. The WCA has the net effect of forcing the Respondent to undertake the same administrative tax burden[11] it would have as a U.S. corporation.

This burden has resulted in the numerous complaints of foreign nations to this scheme. See, for example, the letter of then Minister of Finance of the Government of Canada, Marc Lalonde, to the then Secretary of the Treasury of the United States, Donald T. Regan, (*Brief of Appellant Alcan*, 860 F.2d 688, 7th Cir. 1988 [Appendix Exhibit "D"]), where the Canadian Minister said in relevant part:

> Second, the costs of compliance arising out of the need to prepare consolidated returns that conform to the state tax accounting requirements are particularly onerous for Canadian and other foreign based companies.

In sum, this constitutes a significant direct burden on Respondent.

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[11] In *Container*, the Court noted at 196:

> [T]he United States is a party to a great number of tax treaties that require the Federal Government to adopt some of arm's length analysis in taxing the domestic income of multinational enterprises . . .

The irony of this observation in the context of a foreign parent is that foreign parents are forced by the FTB to assume the same administrative burden of compliance that the federal government is prohibited from imposing by treaty!

B. Double Taxation

Respondent has also established that the application of WCA constitutes "double taxation." In *Container,* this Court noted that actual double taxation exists when income is taxed by the host country as wholly attributable to it, and then included in the California tax base:

> First, the tax imposed here, like the tax imposed in *Japan Line,* has resulted in actual double taxation, in the sense that some of the income taxed without apportionment by foreign nations as attributable to appellant's foreign subsidiaries was also taxed by California as attributable to the state's share of the total income of the unitary business of which those subsidiaries are a part.

463 U.S., at 196.[13]

Actual double taxation exists in this case. Stipulation #42 (JA at 85) details the taxes paid by the Alcan Unitary Business, by company, to each host jurisdiction in the years 1971, 1977 and 1978. (The parties have agreed that those years are representative – see Stip. #1, JA at 63-64.) In each year the pre-tax income per the financial statements correlates exactly with the California pre-apportioned income. This income was clearly taxed already by host jurisdictions. In 1971, the Alcan Companies had paid $38,321,000 in taxes to host jurisdictions. In 1977, the Alcan Group Companies had paid $53,544,000 to host countries (excluding the U.S.) and in 1978, they paid $75,813,000 (excluding the U.S.) in taxes to host countries. Notwithstanding the fact that significant income tax was already paid to host jurisdictions, WCA again apportioned some of the income to California and taxed it again, thus resulting in *actual double taxation.*

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[13] Petitioner at page 37 of its brief argues that this Court rejected this position in *Shell Oil Company v. Iowa Dept. of Revenue,* ___ U.S. ___, 109 S. Ct. 278, 102 L. Ed. 2d 186 (1988). See also p. 6, *infra.*

Clearly, Respondent's income, not Alcancorp's, is subject to double taxation which is necessarily and exclusively an injury to Respondent.

C. WCA is a Tax Upon Respondent

Finally, Respondent has established the allegation of paragraph 17 of its complaint that WCA is more than an apportionment formula, it actually imposes a tax on Respondent and its non-United States subsidiaries. This can be best illustrated by a hypothetical example. Assume that a local plant manager in one of Respondent's plants in India decides that he can make his plant more productive by rearranging the production process. The rearranging allows him to eliminate some equipment and not replace some retiring employees, while still producing the same output at a lower unit cost. The articles produced are then sold at a lower price in India. What is the net result of his actions? Incredibly, California income tax goes up.[14] Clearly, the activity in India is being taxed, since tax liability is contingent on its activities.

It is true that the same result would occur in the context of an American parent. However, as this Court noted in *Container,* the ultimate economic impact of WCA on an American parent is in the United States, 463 U.S. at 195. Conversely, in the case of a foreign parent, the economic impact is outside the United States. Any increase in U.S. tax liability decreases revenues in Canada for the Respondent.

Moreover, WCA subjects each one of Respondent's one hundred subsidiaries to the exact burden as in the hypothetical example, and the net economic burden of this imposition of tax liability falls on the Respondent in Canada.

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[14] The increase results from the fact that the changes would decrease worldwide sales, payroll and property and thus increase California's relative share of sales, payroll and property.

In the context of Respondent's case, the fact that WCA imposes a tax on Respondent and its foreign subsidiaries is even more dramatically illustrated by the tax imposed by the Petitioners in connection with Alcancorp's Riverside, California facility. The facility was acquired from the Bridgeport Brass Division of National Distillers and Chemical Corporation. When it was acquired, the facility was losing money on the books of National Distillers and Chemical Corporation. Yet, the minute it came into possession of Alcancorp, WCA began attributing income to the facility and taxing it (Stips. #10, #47, #48 and #49; JA at 66-67, 97 and 98).

The Petitioners may attempt to argue that this tax on an entity that is losing money according to its separate books and accounts is justified because there are undetectable transfers of value that are not reflected in regular books and accounts. However, because these hypothetical transfers are undetectable, they, like religious beliefs, must be taken on faith since as Freud commented, the nature of faith is that its validity can neither be proven nor disproven:

> Of the reality value of most of [religious beliefs] we cannot judge; just as they cannot be proved, so they cannot be refuted.

Freud, Sigmund, *Future of An Illusion*. (W. W. Norton & Co., Inc., New York, 1961), p. 31.

When one goes beyond faith to the objective data, the conclusion that the Petitioners in Riverside were simply taxing the Respondent's income derived from sources outside of the U.S. is inescapable. Riverside, throughout its life as an Alcancorp plant, lost $5 million. Nonetheless, the Petitioner taxed it as though it earned $15 million (Stip. #49, JA at 97). Throughout its life, transactions between Riverside and Alcan Group Companies were reviewed by Revenue Canada and the U.S. treasury, and no adjustments were made.

Also, during the life of the plant, Alcancorp was under a consent order with the U.S. Department of Justice to sell the Riverside facility, but was unable to do so (Stip. #50, *Id.* at 98). The reason was simple, the facility was losing money; it had no going concern value, and ultimately Alcancorp shut the facility down and scrapped it (Stip. #50, *Id.* at 98).

Now, why would a company scrap a plant producing the income that WCA attributed to it? Why would a company forego all the secret value that the advocates of WCA claimed was being transferred out of California? The answer is simple and obvious. There was no secret transfer of value. The facility was losing money when Alcan bought it. It continued to lose money. It was recognized by the marketplace and the Internal Revenue Service as a loser, and was finally shut down and scrapped when Alcancorp management realized that no reasonable effort could make the facility profitable.

Management's view of what California was taxing as highly profitable is concisely stated in this excerpt from the Request For Authorization to scrap the facility, attached as part of Stipulation #50 (JA at 88):

> The Riverside sheet products operation has lost money in every year since 1972, averaging some $900,000 of loss before interest and tax per year during the last four years.
>
> The current Annual Plan predicts a loss of $1.3 million in 1976 and a further loss of $0.7 million next year (after interest but before tax). Sales and booking volumes are running about 10% under plan levels so a substantial additional loss, perhaps up to $0.2 million, can be anticipated.
>
> With a few exceptions, the Riverside equipment is narrow and obsolete. Due to the growth pattern of the facility, the layout is inefficient and the "wide" casting and hot rolling line is too narrow even for double width siding. Any modernization program to increase width capabilities beyond 26" would have to embrace almost the entire plant and would probably cost as much as or more than starting on a green fields basis. The California market would not justify this sort of expenditure.

Stipulation of Facts, par. 50, Exhibit XXI.

Where, then did the Petitioners get the $20 million necessary to offset the $5 million loss and create a $15 million profit? The answer is simple and unequivocal. The Petitioners were simply assessing their tax against the Respondent's foreign income, earned and already fully taxed by the host county in which it was earned.

Although it is true, as this Court states in *Container,* 463 U.S. at 188, that WCA, unlike the tax in *Japan Line,* does not result in inevitable double taxation, when the tax is applied to foreign parents that distinction is theoretical rather than substantive. This results from the fact that the Petitioners have selected apportionment factors which, when applied in the context of foreign parents having the vast majority of their investments abroad, will almost always result in the attribution of foreign income into the California tax base. This can be illustrated by a comparison of profit rates in the U.S. as opposed to foreign operations.

Table 1, set forth below,[15] is a comparison of hourly earnings of manufacturing personnel in foreign countries translated into United States dollars. It demonstrates quite clearly the unsurprising fact that wage scales in various countries differ sharply. These differences in wages, however, have a significant impact on the application of the unitary method which takes into account the payroll of Respondent and its non-United States subsidiaries in computing "California" apportioned income. Because Petitioners fail to take account of the variances in wage scales in different countries, the unitary tax method attributes far more net income to California than is actually warranted – and that income is derived from foreign operations of Respondent.

Furthermore, differences in worker productivity levels also produce distortion of the income attributed to California under the unitary tax method applied by Petitioners. Table 2, set forth below,[16] compares the productivity of an American worker to a foreign worker on per

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[15] **TABLE 1**

Hourly Earnings Rates Translated into United States Dollars for Wage Earners in Manufacturing Industries

	Year		
Country	1967	1968	1969
United States	$2.83	$3.01	$3.19
Australia	1.21M	1.28M	1.36M
Austria	.88	.93	.99
Belgium	1.04M	1.09M	1.19M
Brazil	.38	.35	.41
Canada	2.22	2.40	2.60
Denmark	1.62	1.80	2.02
France	.69	.77	.76
Germany, F. R.	1.25M	1.20M	1.55M
Greece	.42	.46	.50
Italy	.68	.71	.78
Spain	.41	.45	.50
Sweden	1.91M	2.02M	2.21M
United Kingdom	1.16	1.23	1.34

(Continued on following page)

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Source: United Nations Monthly Bulletin of Statistics, December, 1972, Table 57 at 148 based on data from International Labor Office. Amounts followed by the letter "M" note wages for males only.

[16] **TABLE 2**

Percentage of U.S. Average Hourly Compensation Adjusted for Estimated Differences in Productivity

Country	1969	1970
Japan	40	40
West Germany	61	72
United Kingdom	65	68
Belgium	60	61

(Continued on following page)

wage dollar basis. It demonstrates that an American employee, for instance, produces only 40% of what a Japanese worker produces for each dollar he is paid. However, because this factor is not taken into account by Petitioners in assessing tax under the unitary method, "California" apportioned income again is greatly inflated.[17] Tables 1 and 2, therefore, indicate that different wage scales and increased worker productivity on a per dollar basis in foreign nations results in the attribution of income to the California tax base.

This attribution of income has long been recognized by the United States government as taxing foreign corporations. In this regard, former Secretary of the Treasury William Simon stated in an October 21, 1978, letter to U.S. Senator Quentin N. Burdick:

> [T]he unitary system contains the implicit assumption that profit rates in different units of a corporate family, engaged in different activities or in different locations are always the same. This is clearly not the case. Thus, to the extent profit rates differ, the unitary system misallocates income. Whenever profit rates are higher in foreign affiliates than in domestic activities, the *unitary system does have the effect of taxing foreign corporations."*

(Continued from previous page)

Canada	79	82
France	58	54
Italy	62	67
Netherlands	74	71
Sweden	72	74

Source: United States Tariff Commission, "Competitiveness of U.S. Industries," T.C. Publication 473 at 30 (1972).

[17] Since the payroll factor is measured in U.S. dollars and since the U.S. worker is paid more money for less output, the formula will attribute income to California even though it is clear that more profits are being made on the Japanese product with the lower labor cost.

Brief of Appellant Alcan, *Alcan Aluminium Limited v. Franchise Tax Board of California*, 860 F.2d 688 (7th Cir. 1988)("Alcan's 7th Circuit Brief"), Appendix Exhibit "F", emphasis supplied.

In a statement on July 19, 1977, before the Senate Foreign Relations Committee, former Assistant Secretary of the Treasury Lawrence N. Woodworth also stated:

> California tax authorities appear to construe the definition of a unitary business very broadly, so that related entities which appear to be independently engaged in very different kinds of activities are aggregated into a unitary business and must be included in a combined report to the tax authorities. "The combined report *is, in effect a consolidated return in the controlled group's worldwide income. . . .*

Id. an Appendix Exhibit "G", emphasis supplied.

The same point was made by former Assistant Secretary of the Treasury for Tax Policy Donald C. Lubick in his testimony before the House Ways and Means Committee on March 31, 1980:

> Now, obviously, if there are different relationships between the factors in different jurisdictions, you are going to have distortions. For example, in the United States we may tend to have payrolls as a larger ratio of sales in the conduct of business than in many other jurisdictions. That means that the weighting of payrolls in the United States to total payrolls is going to allocate more income to a particular jurisdiction. Now this is a perfectly time-accepted and tolerable method of operation when you are dealing with multistate operations, but when you are dealing with many jurisdictions around the world, *it does produce some very serious distortions.*

Id. at Appendix Exhibit "H" at 4, emphasis supplied.

Table 3 shows where the income was earned which became the basis for Riverside's "profitability" in 1971.

TABLE 3

SOURCES OF INCOME FOR ASSESSMENT OF TAX ON ALCANCORP BY CALIFORNIA IN 1971

	PRE-TAX FINANCIAL INCOME (000'S OMITTED)
Canada	$49,990
Brazil	9,104
Malay	812
England	10,264
India	9,142
South Africa	1,602
France	423
New Zealand	1,600
Venezuela	365
Other Foreign Income	5,910
Equity Income, Minority Interest, etc.	16,020
United States (Alcancorp)	(2,484)
WCA Pre-Tax Income of Alcan Unitary Business	$102,758

In 1971, Riverside incurred a loss of $3,482,952 on a separating accounting basis while WCA taxed it as earning a profit of $956,868 in California (Stip. #48, JA at 98). Clearly, the income being taxed came from sources outside of the United States. Thus, in the context of a foreign parent, double taxation may not be technically inevitable but it is certainly very likely, and that likelihood burdens foreign commerce since foreign corporations making business decisions wholly outside the United States must now consider their impact on U.S. tax liability.

In addition, as contrasted with the U.S. parent situation in *Container*, the impact of the double taxation is infinitely more onerous on foreign parents:

> Of course, even the three-factor formula is necessarily imperfect. But we have seen no evidence demonstrating that the margin of error (systematic or not) inherent in the three-factor formula is greater than the margin of error (systematic or not) inherent in the sort of separate accounting urged upon us by appellant. Indeed, it would be difficult to come to such a conclusion on the basis of the figures in this case: for all of appellant's statistics showing allegedly enormous distortions caused by the three-factor formula, the tables we set out at nn. 11-12, supra, reveal that the percentage increase in taxable income attributable to California between the methodology employed by appellant and the methodology employed by appellee comes to approximately 14%, a far cry from the more than 250% difference which led us to strike down the state tax in Hans Rees' Sons, Inc., and a figure certainly within the substantial margin of error inherent in any method of attributing income among the components of a unitary business.

463 U.S., at 183-84, footnote omitted.

Here the distortion is a far cry from a mere 14%. In years 1971 and 1977, the distortion was not the mere 250% that horrified this Court in *Hans Rees' Sons, Inc. v. North Carolina ex rel Maxwell*, 283 U.S. 123 (1931), but infinite. And, in fact, the distortion attributable to Riverside over its life was infinite. This demonstrates the enormity of the distortion when the tax is applied to foreign parents.

Respondent has not only established the truth of the allegations, it has also demonstrated that they dramatically exceed, both in likelihood of occurrence and in impact, the burden imposed by WCA on American parent-foreign subsidiary combinations. Thus, Respondent has demonstrated that WCA as applied to foreign parent combinations constitutes a violation of the Foreign Commerce Clause of the U.S. Constitution because of its burdens on Respondent's foreign commerce, a direct burden on itself, and therefore, Respondent has standing.

D. THE PRINCIPLES ENUNCIATED BY THE SUPREME COURT IN *CONTAINER* ESTABLISH THAT WCA APPLIED TO A FOREIGN PARENT IS AN UNCONSTITUTIONAL BURDEN ON THEIR ACTIVITIES IN FOREIGN COMMERCE.

In *Container*, this Court addressed the issue of the application of WCA apportionment as applied to domestic parents and ruled in that case that WCA as applied to domestic parents was not an unconstitutional burden on foreign commerce. However, the Court explicitly exempted this type of case – the application of WCA apportionment to foreign parents – from that decision. *See* 463 U.S., at 189.

When one reviews the logic of this Court in *Container*, it becomes evident that WCA as applied to foreign parents is unconstitutional for three reasons. First, the tax as applied to foreign parents does not meet the fairness requirement of the Commerce Clause. Second, the critical distinctions drawn by this Court between the doctrine of *Japan Line* and the *Container* situation have no application in the foreign parent case. Third, this Court acknowledged that the *Container* situation was not governed by the *Japan Line* principles, whereas, the foreign parent case clearly was.

1. WCA does not result in a fair tax when applied to foreign parents.

This Court noted in *Container* that the commerce clause as well as due process require that a tax apportionment formula must be fair. 463 U.S., at 169.

Fairness, this Court stated, exists if the tax meets both of the following standards. First, the formula must be internally consistent. This means that if the tax were applied "by every jurisdiction, it would result in no more than all of the unitary business's income being taxed." *Id.* at 169.

Respondent does not dispute for purposes of this motion that the formula applied by the Petitioners meets this test; however, the tax does not meet the second requirement – external consistency.

External consistency means the formula must "actually reflect a reasonable sense as to how income is generated." In addition, this Court noted with respect to external consistency:

> Nevertheless, we will strike down the application of an apportionment formula if the taxpayer can prove "by clear and cogent evidence" that the income attributed to the State is in fact "out of all appropriate proportions to the business transacted in that state," *Hans Rees' Sons, Inc.*, 283 U.S., at 135, or had "led to a grossly distorted results,". . . .

Id. at 170.

In *Container*, this Court approved the formula as externally consistent and fair because the 14% distortion created by the formula was in its view *de minimus* and certainly well below the 250% distortion in *Hans Rees'*, *supra*, which the Court found so clearly offensive. In this case, however, before Alcancorp started closing down facilities in California, the distortion in the two illustrative years of 1971 and 1977 was infinite!

Therefore, WCA as applied to foreign parent combinations is unfair because it is not externally consistent.

2. The Critical Distinctions Drawn By This Court Between *Japan Line* And The Facts In *Container* Do Not Apply In This Case.

In comparing *Japan Line* to the situation in *Container*, the Court noted four similarities: First, the existence of actual double taxation. Second, the fact that the double taxation stems from a serious divergence in the taxing schemes adopted by California and the foreign taxing authorities. Third, the scheme adopted by the foreign authorities is consistent with international practice and, fourth, the Federal Government expressed a preference for the arms length method.

This Court then noted three differences. First, the tax in *Japan Line* was a property tax; in *Container* it was an income tax. The Court referred to *Mobil Oil v. Commissioner of Taxation*, 445 U.S. 425 (1980), for the proposition that the reasons advanced for allocation of a property tax to a single situs "carry little force" in an income tax content.[18] 463 U.S., at 188. This Court never really explained why this distinction is particularly relevant; it certainly is not determinative, since the Court goes on to find other distinctions.

The Court does suggest that property taxes are easier to allocate than income taxes which are like "slicing a shadow", 463 U.S. at 192, therefore, justifying the inaccuracy inherent in the unitary method; however, such a conclusion would represent a complete misunderstanding of the nature of property taxation. A tangible property tax can be as illusive as an income tax, in fact, it was the illusive nature of tangible property taxes that gave rise to the unitary method of taxation in the late 1800's. Note that California admits as much in their *Instructions for Corporations Filing a Combined Report;* (Stip #20, JA at 70, Ex. X-1):

> Development of the Unitary Method.
>
> The unitary approach began in the 1870's in the field of property taxation. At that time, property taxation was the principal source of state revenues. In many of the western states the major property holders were the transcontinental railroads. The state successfully argued that the value of the railroad system lay not in the actual cost of rail and ties, but in the fact that the system connected two distant points and therefore represented an integrated economic unit of which each state could lay claim to its appropriate share. In other words, all the property was valued as

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[18] As we demonstrate herein, the unitary concept was developed to allocate property taxed to more than a single situs.

> a single unit and a portion of the unit's value was assigned to each state by a mathematical formula.

Thus, even if the Court placed some reliance on its belief in some ease of allocation in property taxation versus income taxation, the Petitioners' own history of the unitary tax refutes the validity of that position.

The second distinction drawn by the Court is that in *Japan Line* the double taxation was "inevitable". Once again, the Court did not appear to rely on this distinction as determinative, since it goes on to a third distinction; and, once again, it was obviously focusing on the factual situation of the American parent. In the case of the foreign parent, double taxation is almost always inevitable.

In concluding that double taxation was inevitable in *Japan Line*, this Court in *Container* was concentrating on the fact that under unitary taxation it was possible for the formula to sometimes reduce liability as compared to the arms length method. This distinction is theoretically accurate, and in the context of an American parent, may even occur with some frequency, although California has reportedly adapted to those annoying occasions by finding the group was not unitary for that period.

However, in the context of foreign parents, there is no real distinction. Since foreign parents typically have much more investment outside the United States, and since productivity rates per dollar are almost always higher outside the U.S. (see Table 2, *infra* p. 17), the formula will almost always distort income. *That is exactly what has happened throughout the extensive tax period involved in this case.* Moreover, when the double taxation occurs, it is likely to be enormous in magnitude as contrasted with the American parent situation.

The third difference pointed out by the Court involved the impact of the tax. The Court noted that the tax fell on a domestic corporation domiciled and headquartered in the United States. The Court further stated with respect to this distinction, that it was really focusing on the actual economic impact of the tax. For example, when this Court pointed out that the "legal incidence" of

the tax is on a domestic corporation, it quickly notes in a footnote:

> We recognize that the fact that the legal incidence of a tax falls on a corporation whose formal corporate domicile is domestic might be less significant in the case of a domestic corporation that was owned by foreign interests.

463 U.S., at 195, n. 32.

In the context of the American parent, the legal incidence of the tax and the economic burden, be it double taxation or the administrative burden of compliance, ultimately are U.S. problems, because the ultimate economic impact is in the U.S. Although the Court distinguished *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980) on legal grounds (463 U.S. at 194), *Container's* reference to *Mobil* in this regard is significant, because in *economic* terms *Container* and *Mobil* are essentially the same case. In *Mobil*, the Court was confronted with the unitary apportionment of foreign dividends after repatriation and concluded that, since the dividends had been repatriated, the use of unitary apportionment did not involve an issue of foreign commerce. In *Container*, the Court faced the application of unitary apportionment to consolidated financial income before repatriation, and although it acknowledged a closer connection with foreign commerce than *Mobil*, it still found the legal "incidence"[19] of the tax to be in the United States. Thus, in both *Mobil* and *Container*, it is clear that the economic incidence of the Tax is ultimately in the United States. The economic value of the American owned foreign subsidiary ultimately resides in the American parent and thus, in the United States. In fact, it is clear the Court never really views the domestic parent problem as a foreign commerce issue since it never believed that the

[19] This contrasts directly with the reasoning of the Seventh Circuit, who predicated finding of direct injury on the foreign "incidence" of the tax.

impact of the tax would really lead to significant foreign retaliation:

> Nevertheless, three distinct factors, which we have already discussed in one way or another, seem to us to weigh strongly against the conclusion that the tax imposed by California might justifiably lead to foreign retaliation.

463 U.S., at 194.

This reasoning is consistent with the fact that both this Court and the United States Government have long recognized that the real foreign commerce dispute involved foreign parents, not American parents, as this dialogue between the Court and the Solicitor General in *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*, 463 U.S. 1220 (1983), illustrates:

> THE COURT: And you say that this – the Illinois provision for the type of taxation they imposed, if imposed on anyone at all, would violate the federal commerce clause of the Constitution?
>
> MR. SMITH: We so submit, and indeed, foreign governments have so protested to the United States.
>
> THE COURT: Well, we don't usually rely on foreign governments to tell us what violates the commerce clause, do we?
>
> MR. SMITH: That is true, but I think that in conducting the foreign relations of the United States, the United States government necessarily has to take into account that a particular state method of taxation which is undisputably at loggerheads and quite different and based on completely different theoretical assumptions than the international norm necessarily introduces an irritant to the conduct of our foreign relations that the government can feel is sufficiently serious to impede the conduct of our foreign policy and

thereby, create a foreign commerce clause problem. I think that was the basis of the Court's –

THE COURT: Do you think your trading partners should really object if the states applied this method of American parents with subs abroad, but didn't apply this method to the United States subs of foreign parents?

MR. SMITH: I cannot speculate –

THE COURT: I suppose the latter is what really worries the –

MR. SMITH: I cannot speculate as to what foreign governments would or would not find objectionable. It is true that the state and many of its supporting amici seek to minimize the seriousness of the diplomatic protest that we avert to, and which the other amici avert to by emphasizing that they address the case of a foreign parent with a domestic subsidiary, and I – to be sure, the United States views the case of a foreign parent with particular and special concern, because of the burdensome record-keeping in conforming with the U.S. Dollar accounting principles –

Alcan's 7th Circuit Brief, Appendix Exhibit "I" at 19-21.

Moreover, if the issue of retaliation were ever in doubt, it may now be put to rest because of the action of the British Government in passing legislation aimed at retaliation against California's imposition of the tax on unitary groups owned by its nationals.[20] The fear of companies who will suffer from this retaliation is illustrated by the April 9, 1985, letter from the president of Exxon Corporation to Secretary of the Treasury James

[20] House of Commons Official Report, *Parliamentary Debates* (Hansard), pp. 1014-18 (10 July 1985).

A. Baker, attached as Appendix Exhibit "J" to Alcan's 7th Circuit Brief, which states in relevant part:

Dear Mr. Secretary:

There is pending in the United States District Court for Northern District of Illinois (Civil #84C932) an injunctive suit by two foreign-based multinational companies, Alcan Aluminum [sic] Limited (Canada) and Imperial Chemicals Industry PLC (U.K.) against the Franchise Tax Board of California. The Court has recognized that the plaintiffs have standing to sue and that their complaints state a prima facie case for injunctive relief.

The two principle [sic] issues presented are (1) whether California Worldwide Unitary Taxation imposed double-taxation in contravention of the tax conventions between the United States and its principle [sic] trading partners, and (2) whether such taxation imposes a burden upon the foreign commerce and foreign relations of the United States in contravention of the Commerce Clause of the Constitution. Inasmuch as both of these issues concern fundamental principles of substantial importance to the United States, we urge you to express the views of the United States in this case. There is precedent for taking this action, the most recent of which that comes to mind is the memorandum filed by the United States as Amicus Curiae in the case captioned *Chicago Bridge and Iron Company vs. Caterpillar Tractor* which was pending before the Supreme Court in January 1982.

We are not unmindful that the Treasury Department initiated, pursuant to the President's suggestion, a "Worldwide Unitary Taxation Working Group" which studied the problems and recommended solutions to the issues presented by Worldwide Unitary Taxation levied by several states and that further actions are being actively considered by your Department at this time. Nevertheless, our concern continues to grow not only as to the propriety of the continuation of this type of taxation by a few states, but as to the adverse impact upon Exxon that this may have upon our foreign operations as foreign

nations take action to retaliate against us for the tax indignities that their companies are experiencing in those states that impose Worldwide Unitary Taxation. For example, the British Parliament recently enacted stand-by retaliatory authority for their Treasury to invoke against United States' based multinationals. If such authority were exercised, the financial impact upon Exxon's competitive position vis-a-vis foreign-owned companies could be devastating. Similar type action undertaken by other major trading nations could effectively exclude us from a number of foreign markets.

Therefore, the three distinctions drawn by the *Container* Court between the facts in that case and the principles of *Japan Line* do not apply in the foreign parent case.

3. The Court Stated That *Container* Was An Exception To The Doctrine Of *Japan Line*.

Finally, there can be no doubt that this Court did not view the domestic parent situation to be a foreign commerce case because it explicitly stated that the *Container* case was within an exception of the foreign commerce principles enunciated in *Japan Line*:

> The third difference between this case and *Japan Line* is that the tax here falls, not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States. We specifically left open in *Japan Line* the application of that case to 'domestically owned instrumentalities engaged in foreign commerce', *id*. at 444, n. 7, and – to the extent that corporations can be analogized to cargo containers in the first place – this case falls clearly within that reservation.

463 U.S., at 188-89, footnote omitted.

Simply stated, the doctrine of *Japan Line* does not and was not intended to apply to the case of American parents because the ultimate impact of any burden was essentially domestic.

On the other hand, the locus of the burden in the foreign parent context is in foreign commerce and thus *Japan Line* applies.

4. Defendants' Actions Constitute A Burden On Foreign Commerce And Violate The Principles Expressed In *Japan Line*.

It is well established that matters of foreign commerce are the exclusive prerogative of the federal government. *Japan Line, supra* at 448. This Court has stated that when a state seeks to tax the instrumentalities of foreign commerce, two significant principles come into play. The first is the enhanced risk of multiple taxation if a state imposes a tax on activities in foreign commerce:

> If an instrumentality of commerce is domiciled abroad, the country of domicile may have the right, consistently with the custom of nations, to impose a tax on its full value. If a State should seek to tax the same instrumentality on an apportioned basis, multiple taxation inevitably results.

441 U.S., at 447, footnote omitted.

In the case of the foreign parent, and as the facts of this case amply demonstrate, multiple taxation is inevitable as a practical matter. Moreover, this Court in *Japan Line* noted that when the risk of multiple taxation is "enhanced" by the state taxing scheme, the scheme is forbidden by the Commerce Clause:

> When a State seeks to tax the instrumentalities of foreign commerce, two additional considerations, beyond those articulated in *Complete Auto*, come into play. The first is the enhanced risk of multiple taxation . . .
>
> Due to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value, a state tax, even though "fairly apportioned" to reflect an instrumentality's presence within the State, may subject foreign commerce "to the risk of a double tax burden to which (domestic) commerce is not exposed, and

which the commerce clause forbids." *Evco v. Jones*, 409 U.S., at 94, quoting *J. D. Adams Mfg. Co.*, 304 U.S. at 311.

Id. at 446 & 447.

In *Container*, this Court noted that even the arms length method involved a risk of multiple taxation because any allocation system is imperfect; however, WCA as applied to foreign parents is more than simply imperfect[21], it enhances the risk of multiple taxation to a level approximating certainty, and it enormously amplifies the impact of the multiple taxation.

In short, the quantitative impact of WCA in the foreign parent case is so much different than the arms length method that, for practical purposes, and certainly for the purposes of analysis under the *Japan Line* doctrine, it should be viewed as qualitatively different.

Japan Line also expressed the need for federal uniformity in areas of foreign commerce, stating:

> Finally, in discussing the Import-Export Clause, this Court, in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976), spoke of the Framers' overriding concern that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments." The need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to "regulate Commerce with foreign Nations" under the Commerce Clause.

441 U.S., at 449 footnote omitted.

WCA applied to foreign parents forces the U.S. to speak with more than one voice. Moreover, when WCA is applied to foreign parents, one obvious consequence noted earlier is that the foreign parent is forced to undertake the administrative burden of complying with a federal tax scheme, notwithstanding the fact that the federal government agreed by treaty it would not impose such a burden on foreign parents operating in this country through subsidiaries. It is, therefore, not surprising that foreign governments would view the application of the WCA to their foreign parent corporations as the U.S. speaking with more than one voice.

The other method by which a tax could frustrate federal uniformity is:

> If a novel [s]tate tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American owned instrumentalities present in their jurisdictions.

463 U.S., at 450

Critical to the *Container* evaluation of the American parent was this Court's view that there was unlikely to be foreign retaliation. In this case, there already is the beginning of actual retaliation, and no wonder, when one considers the disadvantages imposed on foreign nations by the tax.

For example, as was illustrated earlier, the tax sanctions increase in productivity in foreign countries. In the Indian hypothetical on p. 23, *infra*, it was clear that the tax liability to California increases as the Indian company became more productive.

WCA also makes many foreign investments more expensive. For example, many countries require that foreign investors share ownership with the state or with host country nationals. Since WCA pulls into the tax base

21 Although the arms length method is imperfect, that imperfection stems from its application, not its theory. The arms length method uses the marketplace to adjust for the vast differences between the economic realities of each country by measuring accounting results against the results of actual transactions at arms length. Where data is scarce or has not been obtained, the results will be imperfect. With WCA, however, imperfection is systemic because it simply ignores the vast differences in economic realities between countries. For example, under WCA it is assumed that a worker in Thailand makes the same income and produces the same value per dollar as employees in California. Such an assumption is absurd.

the *total* income of a subsidiary, even if ownership is only 51% and because the tax is collected from the American subsidiary, the foreign parent must bear that portion of the tax attributable to the 49% owners of companies whose income was apportioned to the Respondent's tax base (Stip. #46, JA at 97). This, therefore, raises the cost of investments which a Canadian company might wish to make, for example, in Mexico.

Another disadvantage of WCA is that it imposes sanctions on the exploitation of cheap and abundant resources outside of California. For example, to the extent that Respondent is able to find cheaper and more abundant sources of raw materials, such as bauxite, outside of California, tax liability to California rises. This results from the fact that the lower the cost of the capital and labor required for the exploitation of the resources, the more the formula will impute income to California thereby raising the cost to Respondent of utilizing these resources.

Thus, it is clear that WCA as applied to foreign parents acts as a method for penalizing those parents for undertaking activity outside the U.S. that is economically more attractive than the same activity in California. Therefore, there is no wonder that foreign governments have been so enraged by the tax, and that the United Kingdom is prepared to retaliate.[22] Clearly, WCA as applied to foreign parent combinations frustrates federal uniformity.

Finally, the Federal government has expressed in no uncertain terms its view that this tax has interfered with its ability to conduct foreign commerce. Secretary of the

[22] This Court should not be lulled into complacency because actual retaliation has not occurred. International restraint has been exercised because of the recognition of the catastrophic consequence of retaliation and the difficulty of stopping it.

Treasury Baker in a December 18, 1985, letter to the then Speaker of the House Thomas P. O'Neill, Jr. stated:

> The practice of a small, but important minority of the states of assessing corporate income tax on a worldwide unitary basis has caused serious difficulties with the conduct by the federal government of our foreign economic policy. Virtually all of our major investment partners have objected to state practice in this regard. They point out that the worldwide unitary method departs from the principles of international taxation generally followed in the international community and by the federal government. Furthermore, they claim that imposition of the unitary method on their U.S. subsidiaries creates serious administrative burdens in obtaining and converting to U.S. standards accounting information on the foreign affiliates of the unitary group. Finally they argue that the use of the worldwide unitary method may lead to double taxation of the foreign source income of these foreign affiliates. We agree with these contentions. These objections have resulted in the adoption of enabling legislation by the United Kingdom permitting serious retaliatory measures to be taken against U.S. companies. It has become clear that the ability of the federal government to speak with one voice in the conduct of foreign economic affairs is significantly weakened because of these state practices.

Alcan's 7th Circuit Brief, Exhibit K, p. 1

The burden imposed by WCA on Respondent and other foreign parents is unmistakable. Alcancorp is not making bauxite investments or operating in Mexico, Respondent is and its ability to conduct these affairs without considering the direct economic impact on its investment in the U.S., which directly burdens it and causes the tax to be unconstitutional and gives rise to standing.

III. THERE IS NO SERIOUS ISSUE AS TO THE APPLICATION OF THE TAX INJUNCTION ACT OR COMITY THAT APPLY IN THIS CASE.

A. THERE IS UNANIMITY AMONG THE CIRCUITS THAT THE TAX INJUNCTION ACT DOES NOT APPLY TO THIS CASE

The Petitioners attempt to resurrect the argument that has, except for one early, subsequently reversed, district court opinion, been a consistent series of losses and that is that the Tax Injunction Act explicitly bars this case. In some convoluted manner, the Petitioners cite as authority a case in which a State is the plaintiff, has no direct remedy of its own and avoids the impact of a similar statute with respect to federal taxes. One would think that such a holding would support Respondent's series of successes on this issue. Equally puzzling is the final case they cite, *Norman v. Consolidated Edison Co. of New York*, 89 F.2d 619 (2d Cir. 1937), which the Petitioners agree was effectively reversed by this Court later the same year in a similar case.

In sum, after claiming "conflict with past authority", the Petitioners simply cite a series of cases whose outcomes simply confirm the decision of the Seventh Circuit. It is undisputed that Respondent has no remedy and, therefore, it is equally clear that the Act does not apply. Nor was Petitioners' failure to give Respondent a remedy an oversight. When questioned, Petitioners made it quite clear that they would never grant Respondent a remedy because in their view the tax imposed no foreign commerce burden.[23]

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[23] The Seventh Circuit notes: "It is also significant that California presumably possesses a ready remedy for unwanted federal intrusion. . . . With such an effective means of self-help for the state so near at hand, we cannot conclude that comity requires us to deny plaintiffs the opportunity to appear as named parties to litigate their constitutional claims." 860 F.2d, at 699.

B. COMITY AND THE POLICY UNDERLYING THE TAX INJUNCTION ACT DO NOT COMPEL THE APPLICATION OF THE TAX INJUNCTION ACT

In an apparent effort to find some legal doctrine under which to deny standing the Petitioners, in an act of desperation, seem to lapse into a general discussion of the policy of the Tax Injunction Act:

> If federal standing is not to be so limited, will the federal courts be deluged with the suits filed by domestic companies which are dissatisfied with the state tax treatment of their subsidiaries? *Meanwhile, what happens to the spirit, if not the letter of the Tax Injunction Act?*

Petition for writ, at 18 (emphasis added).

There is some authority for the proposition that comity and federalism might under the proper circumstances, cause a federal court to defer federal action. The Seventh Circuit expressly considered and rejected the application of that doctrine for two reasons. First, the absence of a remedy to the directly injured party, and second, the balancing of federal comity against international comity. Respondent would urge that a third reason compels federal action and that is federal comity itself.

The fact that Respondent has no cause of action has important practical implications. The corollary to this proposition is that even if Alcancorp has a remedy it is practically not as effective.[24] A suit by Alcancorp on the foreign commerce issue is a suit by Alcancorp in name only. This is perhaps best illustrated in the context of a

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[24] The Seventh Circuit's reasoning proceeded on the assumption that Alcancorp did have a remedy in the State Court. In fact, that issue is in serious doubt. California's Code of Civil Procedure; § 367 specifically states that civil actions must be prosecuted in the name of the "real party in interest". If the injury is the effective deprivation of the use of a subsidiary as a vehicle for the conduct for foreign commerce, there is but one real party in interest, the Respondent.

non-wholly owned foreign subsidiary, where the foreign parent is a 51% owner. Thus, the subsidiary is subjected to WCA, and the remaining 49% is owned by U.S. nationals. Clearly, the U.S. interests would have little ability and little interest in sharing the economic burden of litigating a foreign commerce burden. Forcing the American interests to litigate the interests of the foreign owner is clearly litigation by surrogate.

The second reason offered by the Seventh Circuit is the balancing of international comity with federal comity. By this, we understand the Seventh Circuit to be saying that it has to abide by the expectations of the foreign nations, as well as states, and that these nations would object to no access for their citizens in any form, a situation which would hardly outweigh matters of convenience of state administration, especially when the state created the problem.

Third, we believe that federal comity itself requires federal intervention. This is not the typical matter where the only issue is federal review of state action, such as a Due Process challenge. Instead this is a matter involving state intrusion into an area specifically mandated to the federal government. It is Respondent's position that where states intrude on sensitive areas that are constitutionally mandated to the exclusive province of the federal government the comity principles of federalism mandate federal priority.

C. THE CONCERNS OF THE AMICI OF THE PETITIONERS ARE, TO THE EXTENT THEY ARE ASCERTAINABLE, DISTINGUISHABLE FROM THIS CASE

The Amici in support of the Petitioners fall into two categories. The two briefs filed on behalf of various states, directly and through their Association, make two points. The first is that they have no interest in the merits of the unitary tax issue, and the second is that, as a result of the Seventh Circuit's ruling, they perceived some deluge of litigation in the federal courts. Respondent was particularly interested in these briefs because, as we had

argued, the standing question was uniquely tied to the merits of the unitary tax case, and the ability to apply this doctrine indistinguishably to other situations would be troublesome. If there is any blatant hole in the arguments of these amici, it's the fact that they are unable to give one example of the application of the principles enunciated by the Seventh Circuit beyond the unitary context. They give a thorough list of all the black letter rules, the same black letters rules that the Petitioners recite. The problem is that they do not illustrate how the Seventh Circuit violated those rules in such a way that would give rise to a situation on which they might have some legitimate concern outside of the unitary context. Perhaps we are lucky that they are only amici since no one will have the opportunity to ask them for an example, and we would all be embarrassed by the deafening silence of the response.[25]

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[25] One Amicus, the group of Associations, suggest this is a case of "forum shopping." That claim is not supported by the facts. Respondent would welcome its own opportunity to litigate in the state court since the existence of such an opportunity would effectively resolve the constitutional issue in Respondent's favor. Moreover, this Amicus failed to answer the question, shopping for what? In forum shopping, one is usually looking for a forum which has not already resolved the issue adversely. We know of no such decision in the California State Courts, and see no reason why the California State Courts were more or less likely to rule against the foreign parent. On the contrary, in *Barclay's Bank Int'l Ltd. v. Franchise Tax Board*, Calif. Sup. Ct. No. 325059, a case that does not even involve a subsidiary method of operation, the foreign parent prevailed in the California Courts. There, of course, Barclay was also the taxpayer, so it had its own remedy. Finally, since this issue (however and whomever was going to resolve it), was clearly not one that would languish for any period without review by this Court, one could hardly make a national case for going into the federal system with all the attendant problems, such as abstention, the Tax Injunction Act standing, etc., without some important objective. That objective was to insure that *its* case about *its* injuries was before the Court.

Perhaps the biggest surprise is the Amicus brief of the Multistate Tax Commission ("Multi"). Framed as supporting Petitioners, Respondent could have hardly done a better job if it had written the section on standing itself. It has been the gravamen of this case that the merits of the constitutional issue and standing were inextricable. Rule on one and you rule on the other. Imagine our surprise when we see Multi making the same point, perhaps inadvertently, but then again the truth does have the nasty habit of sneaking out when least expected:

> [Y]our *Amicus* submits that the indirect and derivative nature of the claimed injuries of Alcan and Imperial establish that these injuries are inextricably intertwined with the issues presented by the subsidiaries in their pending state refund proceedings.

Amicus Brief of the Multistate Tax Commissioner, at 13.

Of course, the only issues in the state refund action are the constitutional issues, and we agree they are inextricably intertwined with the issue of whether we are directly or indirectly injured. Predictably, the remainder of that section deals with the merits of the unitary issue.

IV. CONCLUSION

For all of the foregoing reasons, the decision of the Seventh Circuit Court of Appeals should be affirmed.

Respectively submitted,

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